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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1531

THOMAS A. LARKIN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

THOMAS A. LARKIN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, THOMAS A. LARKIN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 8, 1980, denying a petition for rehearing directed to that Court's written opinion dated November 5, 1979. The initial Fifth Circuit opinion affirmed an order entered by a District Judge of the United States District Court for the Middle District of Florida in a criminal prosecution denying petitioner's motion to dismiss on double jeopardy grounds. The opinion of the United Sates Court of Appeals for the Fifth

Circuit held that where criminal liability for the substantive counts of an indictment is based solely upon the defendant's membership in a conspiracy charged in a separate count, the defendant's double jeopardy right is not violated by a retrial on the conspiracy count after acquittal on the substantive counts in the first trial. A timely petition for rehearing was denied by the Court of Appeals and judgment was entered. The petitioner now prays that this Court review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The November 5, 1979, opinion of the United States Court of Appeals for the Fifth Circuit is reported at 605 F.2d 1360. The slip sheet opinion is set out in the appendix to this petition. (App. 1a-23a).

The opinion of the United States Court of Appeals for the Fifth Circuit denying petitioner's petition for rehearing is reported at 611 F.2d 585. The slip sheet opinion is also set out in the appendix to this petition. (App. 24a-26a).

JURISDICTION

The opinion of the Court of Appeals was entered on November 5, 1979. The Court of Appeals denied a timely petition for rehearing on February 8, 1980. On February 26, 1980, Mr. Justice Powell extended the time for filing this petition to and including March 31, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

If criminal liability for the substantive counts of an indictment is predicated solely upon a conspiracy charged in a separate count, does retrial on the conspiracy count after jury verdicts of not guilty on the substantive counts violate the double jeopardy clause of the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

> No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb; * * *.

STATEMENT OF THE CASE

Petitioner is the defendant in a criminal prosecution instituted in the United States District Court for the Middle District of Florida. Count one of the indictment charges that the petitioner, an attorney, and a co-defendant, the president of a labor union local, violated 18 U.S.C. §371 by conspiring to commit five illegal acts in violation of: 18 U.S.C. §§1503, 1510, 1622, and 29 U.S.C. §§439(c), 501(c) (R. 1-10).*

Counts two, four, and six accuse petitioner and the co-defendant of embezzling union funds on three separate occasions in violation of Section 501(c) (R. 10-13). Counts three, five, and seven accuse petitioner and his co-defendant of violating Section 439(c) by making false entries in the union records required to be kept under 29 U.S.C. §§431(b) and 436 (R. 10-13).

*"R." refers to the record on appeal in the lower court.

There is a direct correlation between the substantive offenses charged in counts two through seven and the overt acts of the conspiracy alleged in count one. In particular, overt acts 41, 30, and 28 directly relate to the criminal activity alleged in substantive counts two and three; six and seven; and four and five respectively. Further, all of the substantive offenses were allegedly committed within the time-frame of the conspiracy charged in count one.

Since counts two through seven do not allege that petitioner was an officer or employee of the labor union in question or that he aided or abetted the union president, pretrial defense pleadings were filed attacking the indictment and questioning the prosecution's theory of petitioner's criminal liability for the substantive counts (R. 37-44, 181-184). The government's response (R. 96-107) made it clear that its position is that petitioner's criminal liability for these substantive counts rested solely upon his membership in the conspiracy charged in count one. In its written response to petitioner's motion to dismiss, the government relied upon the vicarious liability theory for co-conspirators first enunciated by this Court in *Pinkerton* v. *United States,* 328 U.S. 640 (1946), which holds that a defendant who is a member of a continuing conspiracy is criminally responsible for the reasonably foreseeable substantive offenses committed by a co-conspirator in furtherance of the conspiracy (R. 100-102). This vicarious liability theory was reiterated by the government during oral argument at the pretrial hearing held on the motion to dismiss (R. 591-592, 597).

The prosecutor also argued the *Pinkerton* theory of vicarious criminal liability to the jury urging petitioner's liability for the offenses alleged in counts two through

seven during his opening and closing arguments to the jury (R. 241-242; 514-515). (Petitioner's pretrial motion for a severance from the co-defendant was granted).

The jury then received extensive instructions from the trial judge on conspiracy; and they were instructed as to counts two through seven on the *Pinkerton* theory, which was based solely upon petitioner's alleged membership in the conspiracy charged in count one (R. 346-422; TT. 2268-2319).** Specifically, the trial judge instructed the jury that there were four essential elements of the offenses alleged in counts two, four, and six (the embezzlement counts) and three essential elements of the offenses alleged in counts three, five, and seven (the false record counts) (R. 394-401; TT. 2293-2302). The last element as given in the jury instructions as to each of the substantive counts was:

> * * * that the defendant and [co-defendant] were members of the conspiracy alleged in *Count One* of the indictment and the alleged [substantive offense] took place during the course of the conspiracy and was reasonably foreseeable by the defendant Thomas A. Larkin as a necessary or natural consequence of conspiracy and * * * was intended by [the co-defendant] to further the purpose or purposes of the conspiracy. (R. 396, 401; TT. 2297, 2302) (emphasis added).

Under the terms of the indictment and the jury instructions given to his jury, petitioner could have been found guilty of both the conspiracy count and all of the substantive counts.

**"TT." refers to the trial transcript which was part of the record on appeal in the lower court.

The jury returned verdicts of not guilty as to counts two through seven (R. 423; TT. 2321-2334, 2343), but was "hopelessly deadlocked" as to count one and a mistrial was declared as to that count by the trial court (TT. 2343-2344).

After the government informed the trial court and petitioner's counsel by written communication that it intended to retry petitioner on count one (R. 425), petitioner filed a motion to dismiss count one on the ground of double jeopardy (R. 429-438). By way of this motion, petitioner argued that a retrial of the conspiracy alleged in count one would violate his constitutional right against double jeopardy because this conspiracy was a "lesser included offense" of the substantive offenses for which he had already been tried and acquitted. This motion to dismiss was denied (R. 644). Thereafter, a timely interlocutory appeal was taken to the Fifth Circuit under the authority of *Abney* v. *United States,* 431 U.S. 651 (1977), and petitioner's retrial was stayed by an order of the trial court (R. 646).

Petitioner's legal argument to the Fifth Circuit was premised upon the "same offense" test for double jeopardy, enunciated by this Court in *Blockburger* v. *United States,* 284 U.S. 299 (1932), as approved and applied to "lesser included offenses" by this Court in a trio of recent cases: *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Jeffers* v. *United States,* 432 U.S. 137 (1977); and *Harris* v. *Oklahoma,* 433 U.S. 682 (1977). Petitioner's legal position was that since the existence of the conspiracy charged in count one was the sole basis for his criminal responsibility for the substantive counts, the count one conspiracy became a "lesser included offense" of the substantive counts since every element of the former charge had to be proved to establish the latter offenses.

Relying upon *Brown, Jeffers,* and *Harris,* petitioner asserted that his retrial on the lesser offense, the count one conspiracy, would violate the double jeopardy clause, because he had already been tried and acquitted of the "greater offenses", the substantive counts.

The Fifth Circuit seemed to accept petitioner's legal argument:

> Like the appellant, we find it somewhat difficult to square *Pinkerton* with the double jeopardy cases discussed [*Brown, Jeffers,* and *Harris*]. * * * Just as the intent necessary to prove felony murder was provided by the robbery with firearms charge in *Harris,* the intent to establish Larkin's liability for the act of his co-conspirator is supplied by the conspiracy charge. Just as Harris' participation in a robbery created his liability for the shot of his partner, Larkin's formation of a conspiracy with [the co-conspirator] established Larkin's liability for [the] embezzlement of union funds and falsification of union records. It would therefore appear that under *Harris,* the conspiracy charge against Larkin is a lesser included offense of the *Pinkerton* vicarious liability offenses, counts two through seven. 605 F.2d at 1367 (App. 13a-14a) (footnote and citations omitted).

The Fifth Circuit also recognized that the double jeopardy clause prohibits reprosecution of a defendant on a lesser offense after acquittal for the greater offense:

> [T]he double jeopardy clause not only prohibits the imposition of double punishment for

> the same offense, *but also prevents the incurable injury caused a defendant who must run the gauntlet twice for the same offense. Re-prosecution* on a lesser offense in a second trial after an acquittal on a greater charge in the first would seem to cause such an injury * * *. 605 F.2d at 1367-1368 n. 20 (App. 14a-15a) (citations omitted and emphasis added).

However, the Fifth Circuit affirmed the trial court's order denying petitioner's motion to dismiss because of what it termed "the procedural posture of this case". 605 F.2d at 1367 (App. 14a). First, the Fifth Circuit distinguished *Brown, Jeffers,* and *Harris* because the defendants in those cases had been subjected to two independent proceedings, while the petitioner was subjected to only one trial in which the lesser included offense (the count one conspiracy) and the greater offenses (the substantive counts) were tried simultaneously. The Fifth Circuit concluded:

> * * * Thus, even assuming the validity of Larkin's argument that the conspiracy charge is a lesser included offense * * * , Larkin's position is indistinguishable from a defendant who was tried on a murder charge and a manslaughter count *in the alternative.* Such simultaneous jeopardy for greater and lesser included offenses is clearly proper. 605 F.2d at 1367-1368 (App. 14a-15a) (footnote omitted and emphasis added).

Second, the Fifth Circuit, relying upon *Green* v. *United States,* 355 U.S. 184 (1957), and *Price* v. *Georgia,* 398 U.S. 323 (1970), applied the concept of "continuing jeopardy" to a lesser included offense and ruled that an acquittal on a greater offense does not

preclude a retrial on a lesser offense to which "continuing jeopardy" has attached due to a mistrial caused by a deadlocked jury. 605 F.2d at 1368-1369 (App. 16a-17a).

REASON FOR GRANTING THE WRIT

IF LIABILITY FOR THE SUBSTANTIVE COUNTS OF AN INDICTMENT IS PREDICATED SOLELY UPON A CONSPIRACY CHARGED IN A SEPARATE COUNT, THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS RETRIAL FOR THE CONSPIRACY AFTER JURY VERDICTS OF NOT GUILTY ON THE SUBSTANTIVE COUNTS.

During this Court's 1976 term, it decided a trilogy of cases which reiterated and clarified the long-standing rule that once a person is tried for an offense he cannot be reprosecuted for a greater or lesser included offense. *Harris* v. *Oklahoma,* 433 U.S. 682 (1977); *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Jeffers* v. *United States,* 432 U.S. 137 (1977). The rationale for this rule is that, for double jeopardy purposes, the lesser included offense is the "same offense" as the greater offense and vice-versa.

In *Brown,* a majority of this Court reversed the defendant's conviction for auto theft after he had earlier plead guilty to the charge of joyriding arising from the illegal taking of the same automobile. This Court applied the test enunciated in *Blockburger* v. *United States,* 284 U.S. 299 (1932), to determine whether the two offenses were sufficiently distinguishable to permit successive prosecutions. Mr. Justice Powell, writing for the majority, expressed the lesser included offense principle of double jeopardy:

> As is invariably true of a greater and lesser included ofense, the lesser offense — joy-riding

> — requires no proof beyond that which is required for conviction of the greater — auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it. 432 U.S. at 168.

The rationale of the *Brown* decision was reaffirmed by this Court in *Jeffers.* Two separate indictments were returned against Jeffers. The first charged him with committing a conspiracy in violation of 21 U.S.C. §846 and the second charged him with conducting a continuing criminal enterprise to violate the drug laws in violation of 21 U.S.C. §848 during the same time period specified in the conspiracy indictment. He successfully opposed the prosecution's motion to try both cases together and was tried and convicted on the conspiracy charge. Subsequently, in a separate trial, he was found guilty of engaging in a continuing criminal enterprise. Jeffers received the maximum sentence for each conviction, the second sentence to run consecutive with the first sentence.

A plurality of this Court, after assuming that Section 848 requires proof of an agreement among the persons involved in the continuing criminal enterprise, found that Section 846 was a lesser included offense of Section 848. Nevertheless, the plurality held that Jeffers' constitutional right against double jeopardy had not been violated by his successive prosecutions for a greater and lesser included offense because he had waived this right by opposing the prosecutor's joinder motion. The plurality did hold that, since the two offenses were the same for double jeopardy purposes, the Fifth Amendment barred consecutive sentences. 432 U.S. at 154-158. The four dissenting Justices argued that a waiver had

not taken place, and the double jeopardy clause had been violated by two successive "same offense" prosecutions. These Justices also agreed that cumulative punishment was impermissible. 432 U.S. at 158-160.

In the third decision in this trilogy, *Harris* v. *Oklahoma,* the defendant was first convicted of a murder committed by his accomplice in the course of a robbery under the felony-murder rule. He was subsequently tried and convicted on a separate information charging the robbery. Relying on a state court finding that, in a felony-murder case, the proof of the underlying felony (robbery) is needed to prove the intent necessary for a felony-murder conviction, this Court held that the second prosecution violated the prohibition against double jeopardy:

> When, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one. 433 U.S. at 682-683 (per curiam) (footnote omitted).

When *Brown, Jeffers,* and *Harris* are read in conjunction it is clear that all nine Justices of this Court agree on the fundamental principle that double jeopardy bars a prosecution for a lesser included offense after trial for the greater offense.

> Whatever the sequence may be, the Fifth Amendment forbids successive prosecution * * * for a greater and lesser included offense. *Brown* v. *Ohio, supra* at 169 (footnote omitted).

Rather than basing the petitioner's liability for the substantive offenses upon a distinct conspiracy, the government chose to allege one massive conspiracy with multiple objectives in count one and then use the same conspiracy to enlarge the petitioner's liability under *Pinkerton*. The government alleged and consistently argued that a single conspiracy existed. The trial court held that the count one conspiracy was the same conspiracy upon which the petitioner's liability for the substantive offenses was based, and instructed the jury that the proof required to convict the petitioner of the substantive offenses included proof of his membership in "the conspiracy alleged in Count One" (R. 396, 401; TT. 2297, 2302).

Therefore, in proving the substantive offenses, the Government necessarily was required to prove the count one conspiracy. Applying the *Blockburger* test, the count one conspiracy and the substantive offenses are the "same offense" for double jeopardy purposes because each offense did not require proof of an additional fact which the other did not. Following the teachings of this Court in *Brown, Jeffers,* and *Harris,* the petitioner's acquittals for the greater offenses charged in counts two through seven bar his retrial on the lesser included count one conspiracy.

The Fifth Circuit, instead of correctly applying this Court's lesser included double jeopardy trilogy, created an erroneous artificial exception because the petitioner had not been subjected to two independent prosecutions. 605 F.2d at 1367 (App. 14a-15a). This distinction is meaningless because the *Brown-Jeffers-Harris* principle applies where greater and lesser included offenses are charged in a single indictment. *United States* v. *Bender,* 606 F.2d 897 (9th Cir. 1979); *United States* v. *Buckley,*

586 F.2d 498 (5th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979). Furthermore, like the defendants in *Brown, Jeffers* and *Harris,* the petitioner was subject to guilty convictions for all seven offenses – the lesser included count one conspiracy and the greater substantive offenses charged in counts two through seven. The petitioner's legal position was therefore distinguishable from a defendant "who was tried on a murder charge and a manslaughter count in the alternative." 605 F.2d at 1368 (App. 15a). The decision of the Fifth Circuit thus necessarily conflicts with the decisions of this Court in *Brown* v. *Ohio, Jeffers* v. *United States,* and *Harris* v. *Oklahoma* and with the decisions of the lower federal courts cited above.

The Fifth Circuit has also misinterpreted this Court's opinions in *Price* v. *Georgia,* 398 U.S. 323 (1970), and *Green* v. *United States,* 355 U.S. 184 (1957). In each of those cases, this Court ruled that when a defendant is acquitted of a greater offense but convicted on a lesser offense and successfully appeals that conviction, he may be retried for the lesser offense but not the greater. "[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal * * * when the jury was given a full opportunity to return a verdict on the greater charge." *Price* v. *Georgia, supra* at 329 (footnote omitted).

Likewise, once the petitioner was acquitted of the greater offenses his jeopardy for the lesser included offense terminated. The Fifth Circuit's contention that the petitioner "stands in a position identical to the defendant in *Price*", 605 F.2d at 1368 (App. 17a), turns that decision on its head and ignores the *Brown-Jeffers-Harris* lesser included double jeopardy principle.

In view of the failure of the Fifth Circuit to correctly apply the *Brown-Jeffers-Harris* doctrine, it is necessary for this Court to grant certiorari in this case so as to reexamine the *Pinkerton* theory of vicarious criminal liability in the light of these cases and to resolve the double jeopardy issues presented here. A significant number of federal prosecutions involve vicarious liability based upon the *Pinkerton* theory. *See, e.g., United States* v. *Tilton,* 610 F.2d 302, 309 (5th Cir. 1980); *United States* v. *Michel,* 588 F.2d 986, 999 (5th Cir. 1979), *cert. denied,* ____ U.S. ____, 100 S.Ct. 47 (1979); *United States* v. *Moreno,* 588 F.2d 490, 493 (5th Cir. 1979), *cert. denied,* 441 U.S. 936 (1979).

Under the *Pinkerton* theory, criminal liability radiates out from the focal point or apex of the conspiracy like a cone. The legal question of double jeopardy requires a mirror-image or reverse consideration of *Pinkerton:* as criminal liability radiates out from the conspiracy, jeopardy focuses back to the conspiracy focal point or apex. Fairness and logic dictate that the accused, having been tried and acquitted on the substantive offense, cannot be retried for the conspiracy which is the focal point of the liability cone. An analogous legal question is presently pending before this Court in *Whalen* v. *United States,* Case No. 78-5471. In that case, this Court is faced with the question of whether imposition of consecutive sentences for a felony-murder and for the underlying felony, following a single trial, violates double jeopardy. The same considerations which warranted granting certiorari in that case militate in favor of granting certiorari in this case.

The Fifth Circuit's decision here forces the petitioner to "run the gauntlet twice" for the same offense.

Therefore, this Court must grant certiorari in this case and, after further briefing and oral argument, reverse the decision of the lower court so as to resolve any doubt that when liability for the substantive counts of an indictment is predicated solely upon a conspiracy charged in a separate count, double jeopardy prohibits retrial for the conspiracy after acquittal on the substantive counts.

CONCLUSION

In view of the vital importance of the question presented and the considerations set forth above, this Court must grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Thomas A. LARKIN,
Defendant-Appellant

No. 78-2124.

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1979.

Appeal from the United States District Court for the Middle District of Florida.

Before THORNBERRY, GOLDBERG and GEE, Circuit Judges.

GOLDBERG, Circuit Judge:

This case involving the arcane principles of double jeopardy and collateral estoppel is not susceptible of bright-letter law or black-letter law; the areas are most often gray, and dimly to be seen. Needless to say, one entering this field must do so with trepidation.

As a result, the battles in these areas are pockmarked by assaults, retreats, and advances. In both fields we look for terrain that has been fought over, and cast our eyes about for tactical maneuvers in order to discover some grand design which really and in fact can fit the particular case before us for judgment and disposition. But we find no classic to compare to the Clausewitz of military fame. We too are thus hesitant to enter the

field, but we shall do so bravely. And, at analysis' end, we are confident that contemporary jurisprudence justifies our conclusion.

This action arose out of the bombing of a trucking firm by members of a teamsters' local which was engaged in a labor dispute with the company. Appellant Larkin was tried under an indictment which charged, in essence, that Larkin and his co-conspirator, Parker, who was president of the local, conspired to cover up Parker's involvement in the bombing.

The indictment consisted of thirteen counts, seven of which are relevant to this appeal. Count one alleged that Larkin and Parker violated 18 U.S.C.A. § 371[1] by conspiring to commit five illegal acts.[2] It charged that the co-conspirators agreed to obstruct a criminal investiga-

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[1]18 U.S.C.A. § 371 (West 1966), in pertinent part, provides the following:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2]Count one of the indictment is less than artfully drawn. It seems to charge the formation of a conspiracy with three objects and allege the commission of two crimes by the members of that conspiracy. However, the parties have consistently treated the indictment as one alleging a conspiracy with five objects. Moreover, our examination of the record indicates that the trial court concurred in this interpretation. In light of this conduct by the court and the parties, and in the absence of any claim by the defendant of prejudice created by the ambiguity, we treat the indictment as alleging a conspiracy with five objects.

tion in violation of 18 U.S.C.A. § 1510,[3] to obstruct the due administration of justice in violation of 18 U.S.C.A. § 1503,[4] to suborn perjury in violation of 18

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[3]18 U.S.C.A. § 1510 (West Supp.1979) provides the following:

> (a) Whoever willfully endeavors by means of bribergy, misrepresentation, intimidation, or force or threats therof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or
>
> Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> (b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

[4]18 U.S.C.A. § 1503 (West 1966) provides the following:

> Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or

U.S.C.A. § 1622,[5] to embezzle funds of a labor organization in violation of 29 U.S.C.A. § 501(c),[6] and to falsify the records of a labor organization in violation of 29 U.S.C.A. § 439(c).[7] Counts two through seven alleged that Larkin and Parker committed the substantive crimes of embezzling union funds and falsifying union records. Larkin's criminal responsibility under these counts, however, was not based upon any actual participation in the commission of the crimes, but was instead premised upon the vicarious liability theory of *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).[8]

---

corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[5]18 U.S.C.A. § 1622 (West 1966) provides that "[W]hoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined no more than $2,000 or imprisoned not more than five years, or both."

[6]18 U.S.C.A. § 501(c) (West 1975) provides the following:

> (c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

[7]29 U.S.C.A. § 439(c) (West 1975) provides that "[a]ny person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

[8]The indictment on its face does not indicate that Larkin's liability under counts two through seven is vicarious. However, the Government concedes that these charges are based on *Pinkerton v. United States, supra,* which held that a conspirator is liable for the criminal

From the Government's standpoint, the trial was less than successful. Larkin was acquitted by the jury on counts two through seven. As to Larkin's culpability under count one, the jury was "hopelessly deadlocked" and, as a result, the trial court *sua sponte* declared a mistrial as to this count without objection by either party.

Subsequently, the Government notified the court and Larkin that it intended to retry the defendants under count one.[9] In response to this notice, Larkin filed a motion to dismiss, claiming that a retrial on the conspiracy charge would constitute double jeopardy in light of his acquittal on ccounts two through seven, the *Pinkerton* vicarious liability counts. From the trial court's denial of this motion, Larkin appeals.[10]

In support of his double jeopardy claim, the appellant presses two contentions. First, he contends that the conspiracy charged in count one is a lesser included offense of counts two through seven, the counts predicated upon vicarious liability. Accordingly, he argues, his ac-

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acts of his co-conspirator if those acts are committed during the course of, and in furtherance of the conspiracy, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. Moreover, it is evident from the record that the district court tried these counts under this theory. Accordingly, we treat them as *Pinkerton,* vicarious liability charges.

[9]Three other counts of the indictment charged Larkin with liability as a principal under 18 U.S.C.A. § 2 for the crimes of embezzlement of union funds and falsification of union records. The jury was also deadlocked as to these counts. Although the Government intends to retry Larkin under these charges also, they are not pertinent to this appeal, for Larkin does not raise any double jeopardy claim with respect to them.

[10]We have jurisdiction under *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), which allows an interlocutory appeal from a trial court order denying a defendant's double jeopardy claim.

quittal on the greater charges precludes his retrial on the lesser charge. Second, Larkin argues that the collateral estoppel principles engrafted upon the double jeopardy clause by *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), prevents the retrial of the conspiracy count because, in acquitting him of the *Pinkerton* vicarious liability charges, the jury must have found that the defendant was not a member of a conspiracy with Parker. We address each contention in turn.

I

Larkin argues that the conspiracy charged in count one of the indictment is a lesser included offense of the offenses charged in counts two through seven, the *Pinkerton* vicarious liability counts. As a result of his acquittal on the greater charges, the *Pinkerton* counts, Larking contends that he may not be retried on the conspiracy count, the lesser included offense. To establish the validity of this argument, Larkin asks us to compare a trio of recent Supreme Court double jeopardy cases – *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *Jeffers v. United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); and *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) – with *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), the case which established the purported relationship between the conspiracy and vicarious liability counts. Accordingly, we now turn to an examination of this precedent.

In *Brown, supra,* the defendant's double jeopardy claim derived from the fact that he was twice prosecuted for stealing a car from a parking lot in East Cleveland, Ohio. In the first prosecution, the defendant pleaded

guilty to the crime of joyriding,[11] and was sentenced to thirty days in jail and fined one hundred dollars. Subsequently, the defendant was prosecuted and convicted of auto theft.[12] The Supreme Court was confronted with the defendant's claim that this second prosecution violated the fifth amendment prohibition against double jeopardy.

The Court's disposition of this double jeopardy contention depended upon the answer to the threshold question whether Brown's separate trials, arising out of the single auto theft, constituted successive proceedings against him "for the same offense" within the meaning of the double jeopardy clause.[13] To determine whether the two offenses, joyriding and auto theft, were sufficiently distinguishable to permit successive prosecutions, the Court applied the *Blockburger* test:[14]

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[11]The crime of joyriding was established by Ohio Rev.Code Ann. § 4549.04(D) (1973) which provided that "[n]o person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." *Brown, supra,* 432 U.S. at 162 n. 1, 97 S.Ct. at 2223 n. 1.

[12]This prosecution was conducted under Ohio Rev.Code Ann. § 4549.04(A) (1973) which provided that "[n]o person shall steal any motor vehicle." *Brown, supra,* 432 U.S. at 163, n. 2, 97 S.Ct. at 2224 n. 2.

[13]The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." It is applicable to the states through the fourteenth amendment. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

[14]The *Blockburger* test derives from *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), a case in which a potential double jeopardy violation was created by the imposition of cumulative punishments for one criminal occurrence. The Court in *Brown* made it clear that the *Blockburger* test is applicable also to successive prosecutions:

> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . ."

Brown, supra, 432 U.S. at 166, 97 S.Ct. at 2225, *quoting Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Examining the elements of the two crimes, the Court concluded that joyriding and auto theft were the "same offence" for the purposes of the double jeopardy clause:

> As is invariably true of a greater and lesser included offense, the lesser offense — joyriding — requires no proof beyond that which is required for conviction of the greater — auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.

Id. at 168, 97 S.Ct. at 2226. Since the crimes constituted a single offense for double jeopardy analysis, the defendant's second prosecution and conviction were prohibited.[15]

> necessarily will be the same for purposes of barring successive prosecutions. . . . Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings.

Brown, supra, 432 U.S. at 166, 97 S.Ct. at 2225-26.

[15]The Court considered it to be of no import that the defendant had been convicted of the lesser offense: "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown, supra,* 432 U.S. at 169, 97 S.Ct. at 2227 (footnote omitted); *see Jeffers, supra,* 432 U.S. at 151, 97 S.Ct. 2207 (plurality opinion).

The applicability of the *Blockburger* test to multiple prosecutions was reaffirmed by the Court's analysis in *Jeffers, supra.* The two proceedings in *Jeffers* arose from the defendant's leadership of a massive narcotics distribution network in Gary, Indiana. The first indictment returned against the defendant charged a conspiracy to distribute heroin and cocaine in violation of 21 U.S.C.A. § 846.[16] In a second and separate indictment, the defendant was charged with conducting a continuing criminal enterprise to violate the drug laws in violation of 21 U.S.C.A. § 848.[17] Prior to trial, the Government sought joinder of the charges under

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[16]21 U.S.C.A. § 846 (West 1972) provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

[17]21 U.S.C.A. § 848 (West 1972) provides, in pertinent part, the following:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2).
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—.
>
> (1) he violates any provision of this subchapter of subchapter II of this chapter the punishment for which is a felony, and,
>
> (2) such violation is a part of a continuing series of violations of this subchapter of subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and,
>
> (B) from which such person obtains substantial income or resources.

Fed.R.Crim.P. 8. Because the defendant successfully opposed this joinder, the two indictments were tried in different proceedings. At the first trial, the defendant was found guilty on the section 846 charge, and at the second trial, he was convicted of the section 848 offense. Contending that the section 846 conspiracy was a lesser included offense of section 848, the defendant asserted that this second prosecution violated the double jeopardy clause.

In analyzing this claim, the Court assumed, "arguendo, that § 848 does require proof of an agreement among the persons involved in the continuing criminal enterprise." *Jeffers, supra,* 432 U.S. at 149-50, 97 S.Ct. at 2216 (footnote omitted (plurality opinion). The Court then applied the *Blockburger* test and found that section 846 was a lesser included offense of section 848 because of the requirement in section 848(b)(2)(A) of action in concert: "So construed, § 846 is a lesser included offense of § 848, because § 848 requires proof of every fact necessary to show a violation under § 846 as well as proof of several additional elements." *Id.* at 150, 97 S.Ct. at 2216 (plurality opinion). Despite this finding, however, the Court refused to reverse the defendant's second conviction. Instead, it held that the defendant's opposition to the Government's joinder motion constituted a waiver of his normal entitlement "to have charges on a greater and a lesser offense resolved in one proceeding . . . ." *Id.* at 152, 97 S.Ct. at 2217 (plurality opinion).

Harris, supra, presented a factual pattern similar to those of *Brown* and *Jeffers.* During a robbery, the defendant's co-felon shot and killed a grocery store clerk. Subsequent to the defendant's conviction of felony-murder for his participation in the robbery and

the resulting slaying, the defendant was convicted of robbery with firearms. Relying on a state court finding that " '[i]n a felony murder case, the proof of the underlying felony [here robbery with firearms] is needed to prove the intent necessary for a felony murder conviction,' " *id.,* 433 U.S. at 682, 97 S.Ct. at 2912 (per curiam), the Court held that the second prosecution violated the prohibition against double jeopardy: "When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Id.* (footnote omitted) (per curiam).

Against this background of double jeopardy precedent, the appellant asks us to examine the relationship between a conspiracy charge and an accompanying *Pinkerton* vicarious liability charge. We thus turn our attention to *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

Walter and Daniel Pinkerton, brothers and co-conspirators in crime, were indicted for violations of the Internal Revenue Code. The indictment consisted of one conspiracy and ten substantive counts. Each brother was convicted under the conspiracy count and some of the substantive counts.

On appeal the defendants argued that these dual convictions constituted double jeopardy because some of the overt acts alleged in the conspiracy count were the substantive crimes of which they had been convicted. The defendants therefore contended that the substantive counts became merged in the conspiracy count. Rejecting this contention, the Court stated that "[i]t has been long and consistently recognized by the Court that the

commission of the substantive offense and a conspiracy to commit are separate distinct offense." *Pinkerton, supra,* 328 U.S. at 643, 66 S.Ct. at 1182. Thus, "[a] conviction for the conspiracy may be had though the substantive offense was completed. . . . And the plea of double jeopardy is no defense to a conviction for both offenses." *Id.* The Court further observed that "[i]t is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. . . The agreement to do an unlawful act is even then distinct from the doing of the act." *Id.* at 644, 66 S.Ct. at 1182 (footnote omitted).

Daniel Pinkerton also contended that he could not be convicted of the substantive crimes since those acts were committed by Walter only.[18] The Court rejected this claim too:

> The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise.

Id. at 647, 66 S.Ct. at 1184. Thus, Daniel was held to be vicariously liable for the acts of his brother, Walter.

Appellant Larkin examines the relationship between a conspiracy count and a *Pinkerton* vicarious liability count in terms of the *Blockburger* test as approved and applied in *Brown, Jeffers,* and *Harris.* He notes that the existence of the conspiracy between him and Parker is a *sine qua non* to a finding of liability under the vicarious liability counts. From this fact, he argues that the count

[18]Daniel was in prison at the time of Walter's commission of the crimes. *Pinkerton, supra,* 328 U.S. at 648, 66 S.Ct. 1180 (dissenting opinion).

one conspiracy offense is a lesser included offense of the substantive counts since every element of the former charge must be proved to establish the latter offense. Given this relationship between the counts, he argues that a retrial on the lesser offense, the conspiracy charge, would violate the double jeopardy clause, because he has already been tried and acquitted of the greater offense, the *Pinkerton* vicarious liability counts.

Like the appellant, we find it somewhat difficult to square *Pinkerton* with the double jeopardy cases discussed *supra.*[19] The most difficult task of reconciling these

[19]There are three facets of *Pinkerton* which might bear double jeopardy analysis. First, there is the proposition that a conspiracy to commit an act and the commission of that illegal act are distinct crimes, and, as a result, cumulative punishment imposed on the conspirator who committed the act is not improper under the double jeopardy clause. The argument that the double jeopardy holding of *Pinkerton* related solely to this proposition is supported by much of the opinion's language, *see* Slip op. pp. 912-913, pp. , *supra,* and by the Supreme Court's characterization of the *Pinkerton* double jeopardy holding in *Iannelli* v. *United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975):

> [t]he conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. *Pinkerton v. United States, supra,* 328 U.S., at 643, 66 S.Ct., at 1181. Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end.

Id. at 777-78, 95 S.Ct. at 1290; *see id.* at 781-82, 95 S.Ct. 1284.

Second, there is the principle that a conspirator's agreement to commit a crime renders him liable for his co-conspirator's commission of *that* crime. Third, there is the rule that a conspirator who agrees to commit crime X may sometimes be held liable for crime Y committed by his co-conspirator. It is unclear to what extent the double jeopardy language in *Pinkerton* applies to these two vicarious liability situations. Moreover, *Harris, supra,* may necessitate a reexamination of *Pinkerton's* double jeopardy reasoning. In view of our disposition of this case, *see infra,* we need not examine the scope of *Pinkerton's* holding, or the extent, if any, to which *Pinkerton* has been modified by *Harris.*

cases is presented by *Harris, supra,* for the relationship between its felony murder count and the underlying charge, robbery with firearms, seems to be quite analogous to the connection between a *Pinkerton* vicarious liability count and the underlying conspiracy charge. Just as the intent necessary to prove felony murder was provided by the robbery with firearms charge in *Harris, see* 433 U.S. at 682, 97 S.Ct. 2912, the intent to establish Larkin's liability for the acts of his co-conspirator is supplied by the conspiracy charge. *See Pinkerton, supra,* 328 U.S. at 647, 66 S.Ct. 1180. Just as Harris's participation in a robbery created his liability for the shot of his partner, Larkin's formation of a conspiracy with Parker established Larkin's liability for Parker's embezzlement of union funds and falsification of union records. It would therefore appear that under *Harris,* the conspiracy charged against Larkin is a lesser included offense of the *Pinkerton* vicarious liability offenses, counts two through seven.

However, because of the procedural posture of this case, we need not make such a determination. Even if we assume that the conspiracy charge is contained in the vicarious liability counts, Larkin's double jeopardy right will not be violated by the retrial of the conspiracy count.

In *Brown, Jeffers,* and *Harris,* the defendants had been subjected to two independent proceedings. In each cases, trial on either the greater or the lesser charge was followed by a prosecution of the other offense in a separate proceeding. In contrast, Larkin was subjected to only one trial in which the conspiracy and vicarious liability counts were tried simultaneously.[20] Thus, even

[20]The Government argues that *Brown, Jeffers,* and *Harris* are distinguishable from the instant case because in each of those cases a retrial on either the greater or the lesser offense followed a conviction on the other charge, whereas in this case there was a judgment of acquittal on the purported greater offense.

We have serious doubts about the validity of the Government's conclusion. In *Brown* and *Jeffers* the Court stated that the order of the two trials on the greater and lesser offenses was irrelevant for double jeopardy purposes. *See* n. 15 *supra.* In reaching this conclusion, the Court placed great stress on the fact that the double jeopardy clause not only prohibits the imposition of double punishment for the same offense, but also prevents the incurable injury caused a defendant who must run the gauntlet twice for the same offense. *See Jeffers, supra,* 432 U.S. 150-51 & nn. 17 & 18, 97 S.Ct. 2207; *Brown, supra,* 432 U.S. at 165-66, 97 S.Ct. 2221. Reprosecution on a lesser offense in a second trial after an acquittal on the greater charge in the first would seem to cause such an injury because "[t]he risk of conviction on the greater means nothing more than a risk of conviction upon proof of all the elements of the lesser plus proof of the additional elements needed for the greater." *Jeffers, supra,* 432 U.S. at 151 n. 17, 97 S.Ct. at 2216 n. 17; *accord, United States v. Tsanas,* 572 F.2d 340, 345 n. 6 (2d Cir.), *cert. denied,* 435 U.S. 995, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978). In any event, due to our disposition of this case, we leave consideration of this issue to another day.

[21]If Larkin had been convicted of the conspiracy count and the vicarious liability charges, and cumulative sentences had been imposed, or if he had requested, and had been denied, a jury instruction on lesser included offenses, we would be forced to reach the question whether the conspiracy charge was a lesser included offense of the *Pinkerton* vicarious liability offenses. *See Jeffers, supra,* 432 U.S. at 153-55, 97 S.Ct. 2207. Since neither event occurred, however, the issue is not properly before us.

assuming the validity of Larkin's argument that the conspiracy charge is a lesser included offense of the *Pinkerton* vicarious liability counts, Larkin's position is indistinguishable from a defendant who was tried on a murder charge and a manslaughter count in the alternative. Such simultaneous jeopardy for greater and lesser included offenses is clearly proper.[21] *See Jeffers, supra,* 432 U.S. at 152 & n. 20, 97 S.Ct. at 2217 & n. 20 ("a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding") (plurality opinion).

Furthermore, the fact that the jury in Larkin's trial acquitted him of the *Pinkerton* counts and hung on the conspiracy charge, thereby causing a mistrial as to the latter count and allowing the Government to retry the conspiracy charge, does not dictate a different result. It is of course axiomatic that Larkin may not be retried on the charges of which he was acquitted. *See Price v. Georgia,* 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). However, it is equally well settled that a defendant may be retried on a lesser offense, of which he was convicted at an initial trial, after that conviction was reversed on appeal; and that that result obtains even though the first trial also resulted in a verdict of acquittal on a greater offense. *See Price, supra,* 398 U.S. at 326-27, 90 S.Ct. 1757. In *Price* the defendant had been tried simultaneously on murder and manslaughter charges and had been convicted of the lesser offense. The defendant successfully appealed that conviction, and the judgment was reversed. In reversing a murder conviction obtained in a second trial, on the ground that the acquittal on that charge in the first trial barred its reprosecution, the Court made it clear that a retrial on the manslaughter charge was proper:

> [A] concept of continuing jeopardy . . . has application where criminal proceedings against an accused have not run their full course. . .
>
> The continuing jeopardy principle necessarily is applicable to this case. Petitioner sought and obtained the reversal of his initial conviction for voluntary manslaughter by taking an appeal. Accordingly, no aspect of the bar on double jeopardy prevented his retrial for that crime.

Id.

Larkin stands in a position identical to the defendant in *Price*. It is clear that the concept of continuing jeopardy normally applies to a mistrial caused by a deadlocked jury.[22] *See, e.g., United States v. Sanford,* 429 U.S. 514, 97 S.Ct. 20, 50 L.Ed.2d 17 (per curiam); *Downum v. United States,* 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); *Green, supra,* 355 U.S. at 188, 78 S.Ct. 221. Furthermore, an acquittal on a greater offense does not preclude a retrial on a lesser offense to which continuing jeopardy has attached, and this result obtains whether the applicability of continuing jeopardy results from an appellate reversal of a conviction as in *Price* or from a mistrial caused by a deadlocked jury. *Accord, United States v. Scott,* 150 U.S.App.D.C. 323, 464 F.2d 832 (D.C.Cir.1972); *Forsberg v. United States,* 351 F.2d 242 (9th Cir. 1965), *cert. denied,* 383 U.S. 950, 86 S.Ct. 1209, 16 L.Ed.2d 212 (1966). Therefore, Larkin may be retried on the conspiracy charge unless the principles of collateral estoppel dictate a different result, an issue to which we now turn our attention.[23]

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[22]The appellant does not contend that prosecutorial abuse created the mistrial. Nor does he argue that the mistrial was declared by the trial court under an aberrant procedure. Therefore, cases such as *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *Downum v. United States,* 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); *United States v. Gordy,* 526 F.2d 631 (5th Cir. 1976); and *Webb v. Court,* 516 F.2d 1034 (3d Cir. 1975), are inapposite.

[23]The protection afforded a defendant by the collateral estoppel principles of *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) is additional to that accorded by the *Blockburger* test. *See Brown, supra,* 432 U.S. at 166 n. 6, 97 S.Ct. 2221.

II

Collateral estoppel does not have the surgical precision found in double jeopardy, for its basics are founded in equity and therefore command some flexibility. Collateral estoppel need not be composite or synoptic in application, but instead can apply to a single element of a trial.

Since collateral estoppel can apply to a phase, an issue of fact, or congeries of fact with respect to a second trial, to determine its applicability to this multi-count, multi-issued criminal trial, we must examine the many parts, while we keep in view the whole. The intelligent application of collateral estoppel requires that we atomize the charges; we must examine the various counts, the testimony, the jury's verdict. Each requires a parsing in comparison with the other in order to come to a conclusion whether or not collateral estoppel is applicable to one or more of the issues which are to be covered in the second trial.

The complicating factors here are the multicount indictment in the first trial, the inability of the jury to agree, and the findings by the jury of not guilty with respect to some aspects of the charges. But these complicating elements and components do not relieve us of our judicial duty to determine whether collateral estoppel is applicable to one or more of the components involved. While we do not test ourselves as three more jurors in the case, we are compelled to determine as best we can what makes the jury's verdict cohere. The geodetics required of us is not an easy one; we must examine the record with great care.

Larkin contends that the collateral estoppel principles enunciated in *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct.

1189, 25 L.Ed.2d 469 (1970), prevent the retrial of the count one conspiracy charge. He argues that the jury's judgment of acquittal on counts two through seven, the *Pinkerton* vicarious liability counts, necessarily rested on its finding that Larkin was not the member of a conspiracy with Parker. Since that fact has been determined adversely to the Government, he argues, the prosecution may not retry count one. We agree with him only to the extent that count one charges a conspiracy to embezzle union funds and falsify union records.

In *Ashe, supra,* the Supreme Court held that the double jeopardy clause embodies principles of collateral estoppel, and, as a result, the Government may not relitigate issues of fact that had been decided in the defendant's favor in a previous prosecution. The Court stated that the double jeopardy clause mandates the following inquiry:

> Where a previous judgment of acquittal was based on a general verdict as is usually the case, this approach requires a court "to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

Id. at 444, 90 S.Ct. at 1194 (footnote omitted).

Larkin wishes to foreclose from consideration in a second trial the issue whether he was a member of a con-

spiracy with Parker.[24] We need not engage in an extensive search to determine whether the jury's verdict of acquittal on the vicarious liability counts necessarily rested on its conclusion that Larkin was not the member of a conspiracy with Parker, for the jury that rendered this judgment also hung on count one, the conspiracy count. No rational jury could have absolved Larkin of liability for Parker's crimes because of the absence of a conspiracy between the two, while it simultaneously failed to acquit Larkin on the conspiracy charge itself. The jury's verdict must have rested elsewhere.[25] *Accord, United States v. Scott,* 150 U.S.App.D.C. 323, 464 F.2d 832 (D.C.Cir.1972) (jury's deadlock on robbery count indicates that judgment of acquittal on armed robbery count was not based on finding that defendant was not a robber).

This obvious interpretation of the jury's verdicts on the various counts does not end our task, however, for the Government wishes to retry Larkin on count one which still charges him with conspiring to embezzle union funds and falsify union records. The Government proposes this reprosecution despite the first jury's refusal to find that Larkin was vicariously liable for the commission of those crimes. We must determine

[24]Larkin contends that count one *in toto* cannot be retried, and thus we discuss here the foreclosure of retrial on that count insofar as it alleges any conspiracy with Parker — one entered into to accomplish any of the five purposes listed in count one. The fact that the conspiracy count charges a conspiracy specifically to embezzle union funds and falsify union records deserves distinctive treatment, and we therefore focus particularly on those objects *infra.*

[25]We note that the record is almost totally devoid of evidence linking Larkin in any way to the embezzlement and subsequent coverup in the union's records and that, most likely, the acquittal occurred because of this insufficiency of evidence.

whether the jury's not guilty verdict on counts two through seven precludes Larkin's retrial on the theory that he conspired to commit these crimes.[26]

Our first task under *Ashe, supra,* is to pinpoint the issues which the jury deliberated in judging Larkin's culpability under counts two through seven. Then we must determine the issue or issues upon which the jury could rationally have rested its verdict of acquittal.

Our examination of the record, with particular reliance upon the indictment and the charge to the jury, leads us to discern four potential bases for the jury's conclusion. The jury might have found that Larkin did not conspire with Parker; that Parker did not commit the crimes of embezzlement or ecord falsification during the existence of the conspiracy; that Parker did not commit those crimes in furtherance of the alleged conspiracy with Larkin; or that Larkin did not foresee that Parker would commit those crimes as a necessary or natural result of the conspiracy between the two.

We have shown *supra* that the jury did not acquit on the vicarious liability charges because of a finding that Larkin and Parker did not conspire.[27] Furthermore, the fact that Parker committed the crimes during the course of the alleged conspiracy was amply established by ex-

[26]Collateral estoppel may be applied to one count of a multi-count indictment, or to one part of a single count. *See United States v. Mespoulede,* 597 F.2d 329, 334-35, 336-37 (2d Cir. 1979); *cf. Blackburn v. Cross,* 510 F.2d 1014 (5th Cir. 1975) (application of collateral estoppel to evidentiary fact of prior convictions); *Wingate v. Wainwright,* 464 F.2d 209, 212-15 (5th Cir. 1972) (same).

[27]We observe again that here we are discussing the existence of a conspiracy *vel non,* entered into for any of the five purposes listed in count one, as distinguished from a conspiracy with the particular objects of embezzlement and falsifying union records.

tensive direct testimony and documentary evidence none of which was controverted by the appellant. No rational jury could have reached a verdict of acquittal on this basis either. *See Ashe, supra,* 397 U.S. at 438, 444-45 & n. 9, 90 S.Ct. 1189.[28] Accordingly, the jury must have believed either that Parker did not commit the crimes of embezzlement and record falsification in furtherance of a conspiracy with Larkin, or that Larkin did not foresee that Parker would embezzle and falsify records.

Under either of these alternative grounds for the jury's verdict of acquittal on counts two through seven, retrial of a conspiracy to embezzle funds or falsify union records is foreclosed. At the proposed second trial, the Government would have to show that Larkin and Parker agreed to embezzle union funds and to falsify union records. If Larkin and Parker agreed to commit those acts, it must necessarily be true *both* that the commission of those crimes would b e foreseeable to Larkin *and* that the crimes were committed by Parker in furtherance of a conspiracy between him and Larkin. However, the first jury's acquittal necessarily means that at least one of those factual propositions has been decided adversely to the Government. Accordingly, Larkin

[28]The Court approvingly quoted the following statement:

> "If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering. * * * In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction."

Ashe, supra, 397 U.S. at 444 n. 9, 90 S.Ct. at 1194-95 n. 9, *quoting* Mayers & Yarborough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv.L.Rev. 1, 38-39 (1960).

may not be retried for conspiring to embezzle union funds or to falsify union records. The district court is directed to strike from the indictment that portion of count one which charges Larkin with conspiring to attain those purposes.

AFFIRMED in PART: REVERSED in PART.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Thomas A. LARKIN,
Defendant-Appellant.

No. 78-2124.

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1980.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING
EN BANC

(Opinion November 5, 1979, 5 Cir.,
1979, 605 F.2d 1360).

Before THORNBERRY, GOLDBERG and GEE, Circuit Judges.

GOLDBERG, Circuit Judge.

The appellant's petition for rehearing is denied. The appellee's petition for rehearing is granted.

In our initial opinion, reported at 605 F.2d 1360, we held that Larkin could not be retried under count one for conspiring to embezzle union funds and falsify union records because his acquittal under counts two

through seven precluded such a retrial. Rather belatedly, the Government has designed to inform the court that Larkin's potential criminal liability for conspiring to embezzle union funds and falsify union records rests not only on the acts that form the premise of counts two through seven, but also on the acts that constitute the basis for counts eight through ten. After again carefully reviewing the massive record of this case, we conclude that the Government's argument is sound.

In counts two through seven the Government charged that Parker paid union funds to two union members, Johnson and Wright, for work not actually performed. Larkin was charged, and acquitted, of vicarious liability for the payment and hiding of these monies. In contrast, in counts eight through ten Larkin was charged with responsibility for the issuance of checks drawn against union funds for legal services not performed. Because the jury failed to reach a verdict on these counts, Larkin can be retried under them. As our initial opinion discussed, the jury's acquittal on counts two through seven precludes retrial of Larkin for conspiring to embezzle union funds and falsify union records in the manner alleged in counts two through seven. However, the jury's deadlock on counts eight through ten does not preclude retrial of Larkin for conspiring to embezzle union funds and falsify union records in the manner alleged in counts eight through ten. Accordingly, we withdraw the last two sentences of our opinion and substitute the following:

"Accordingly, Larkin may not be retried for conspiring to embezzle union funds or to falsify union records by means of the scheme which forms the basis for counts two through seven. The district court is directed to strike from the indictment that portion of count one

which charges Larkin with conspiring to attain those purposes. Specifically, the district court is directed to strike overt acts 28, 29, 30, 31, and 41 from count one of the complaint. The district court is further directed to determine whether any of the other overt acts alleged in count one relate to the actions forming the basis for counts two through seven. The district court should focus particularly, but not exclusively, on overt acts 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27. Any overt acts which relate to counts two through seven are also to be stricken from the complaint."

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

AFFIRMED in PART, REVERSED in PART.